Supreme Court, U.S.
FILED
JUL 26 2006
OFFICE OF THE CLERK

No. 05-1612

In The Supreme Court of the United States

LATANUA RUDD,

Petitioner,

v.

SHELBY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

LES JONES
DAVID E. GOODMAN, JR.
BURCH, PORTER AND JOHNSON
130 North Court Avenue
Memphis, TN 38103
(901) 524-5000

ERIC SCHNAPPER*
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. The Existence of An Important Inter-Circuit Conflict Is Not Disputed 1

II. Respondent's Fact-Bound Arguments Were Rejected by The Courts Below 3

Conclusion 5

TABLE OF AUTHORITIES

Page

CASES:

Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397 (1997) 2

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 2, 5

Canton v. Harris, 489 U.S. 378 (1989) 2

City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 3

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 2

Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999) 2

Department of Housing and Urban Dev. v. Rucker, 535 U.S. 125 (2002) 3

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 2, 5

Gebser v. Lago Vista Ind. School Dist., 524 U.S. 274 (1998) 2

General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 3

Jett v. Dallas Ind. School Dist., 491 U.S. 701 (1989) 2

Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) 3

Meyer v. Holley, 537 U.S. 280 (2003) 3

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 3

Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) 2

I. THE EXISTENCE OF AN IMPORTANT INTER-CIRCUIT CONFLICT IS NOT DISPUTED

Respondent does not dispute the existence of the inter-circuit conflict described in the petition. The petition sets out 10 decisions in the Sixth Circuit applying that circuit's entrenched "good faith" standard; respondent neither denies the existence of that standard nor disputes our characterization of Sixth Circuit caselaw. The petition sets out 31 decisions in numerous other circuits which apply the very different negligence standard; respondent neither denies the existence of that standard nor disputes our characterization of this large body of caselaw in those other circuits.

Respondent asserts that it would be entitled to prevail "under either standard." (Br. Opp. 5). That assertion necessarily acknowledges the obvious – that there are indeed two distinct and conflicting standards being utilized by the courts of appeals to determine when an employer is liable for co-worker harassment.

Respondent seeks to minimize the significance of this conflict by asserting that the Sixth Circuit's "good faith" (or "deliberate indifference") standard is merely an "interpretation . . . of the negligence standard." (Br. Opp. 4).[1]

---

[1] Respondent indirectly suggests that these two standards are the same. "This 'reasonable care' or 'good faith' standard is not idiosyncratic." (Br. Opp. 5). By using the singular demonstrative pronoun "this" (rather than "these"), the singular form of "standard," and the singular verb "is," this sentence implies that the reasonable care standard and the good faith standard are one and the same. (As in, "The peony or lactiflora peonia originated in China and blooms in the spring.")

(Continued on following page)

The Sixth Circuit rule that "mere negligence" is insufficient to establish employer liability, according to respondent, is actually an "interpretation" of "the negligence standard." *Id.* That somewhat Orwellian statement makes no sense. Negligence and "good faith" are mutually exclusive standards; one cannot be a construction of the other. The Sixth Circuit, sensibly, has never suggested that its repeated decisions rejecting the negligence standard are actually only an interpretation (and adoption) of that very rejected standard. To say that a requirement of bad faith or indifference is merely an "interpretation" of the less demanding negligence standard is like saying that the movie rating NC-17 (18 and older only) is an "interpretation" of the rating G (approved for general audiences).

The standard for determining when an employer is liable for the acts of an employee or agent is a potential issue in most civil actions against an employer, corporation, or government body. Where, as often occurs, Congress has not adopted an express liability standard, the courts must fashion the appropriate standard. This Court has repeatedly granted certiorari to resolve conflicts that have arisen under a wide variety of statutes as to the correct liability standard.[2] The liability standard under Title VII

The distinctions among these various standards of culpability – negligence, indifference, and good faith – pervade centuries of Anglo-American tort, contract, and criminal law, and cannot be caused to disappear by a grammatical sleight of hand.

[2] *E.g.*, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (Title VII); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999) (Title IX); *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998) (Title IX); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (Title VII); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (Title VII); *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397 (1997) (section 1983); *Canton v. Harris*, 489 U.S. 378 (1989) (section 1983); *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701 (1989) (section 1983); *City of*

(Continued on following page)

for co-worker harassment is a matter of disagreement among the lower courts, and can only be resolved by this Court.

II. RESPONDENT'S FACT-BOUND ARGUMENTS WERE REJECTED BY THE COURTS BELOW

Respondent contends that it could not be held liable even under a negligence standard because on the day of the protracted harassment, December 22, 2000, Shelby County officials were not aware that Rudd was being harassed. (Br. Opp. 3-6).

Both courts below expressly rejected this factual contention. The Sixth Circuit correctly acknowledged that "Rudd's immediate supervisors learned of Burton's harassment, and failed to take any corrective action, on December 22."[3] (App. 4a). The district court repeatedly held, as well, that there was ample evidence that on

---

St. Louis v. Praprotnik, 485 U.S. 112 (1988) (section 1983); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (section 1983); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (section 1983); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *see Meyer v. Holley*, 537 U.S. 280 (2003) (liability of corporate owner-operator under Title VIII for claims against corporation); *Department of Housing and Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (legal responsibility of tenant under Anti-Drug Abuse Act for actions of another person residing in apartment).

[3] Respondent prevailed in the Sixth Circuit because the court of appeals concluded that the County's response to that known harassment, taken as a whole, did not amount to a lack of good faith. The court of appeals did not dispute, nor apparently does respondent, that the "fail[ure] to take any corrective action" on December 22, 2000, in the face of known, ongoing harassment would constitute negligence. But in the Sixth Circuit, negligence is insufficient as a matter of law to establish employer liability for co-worker harassment.

December 22 Rudd's supervisors were aware that the abuse was occurring. The district court so concluded in denying respondent's motion for summary judgment,[4] respondent's motion for a directed verdict,[5] and respondent's post-trial motion for judgment as a matter of law.[6]

---

[4] Order Granting in Part and Denying in Part The Motion for Summary Judgment of Defendants Shelby County and Sheriff A.C. Gilless (June 3, 2003), 11 ("The court concludes that genuine issues of material fact remain about whether the county took prompt corrective action when it reasonably should have been aware that the alleged behavior was occurring. The sex-based character of the incident could have been inferred from the belly chain incident. There is evidence that a number of officers, including Sgt. Nelson, a superior officer, were aware of what was occurring and did not intervene.")

[5] Tr. 673:

> I believe there is sufficient evidence in this case for a jury to conclude that management was aware of what was going on. . . . [T]here is sufficient evidence here for a jury to conclude that these two individuals who were her supervisors, two of her three supervisors, who were in the management capacity of the Sheriff's Department were aware of the ongoing sexual harassment.

[6] App. 14a:

> The County claims that . . . it cannot be held liable for any of the events which occurred on December 22, 2000, because Rudd's statements to Moore and Nelson were insufficient to constitute notice of sexual harassment. Rudd testified that she informed Moore and Nelson of Burton's actions earlier that night, although she did not label it sexual harassment at the time. Whether or not this was sufficient notice to Shelby County of sexual harassment was a question of fact for the jury. Judgment as a matter of law is inappropriate because there was sufficient evidence that Rudd had provided notice to create an issue of material fact for the jury. The jury's finding that Rudd provided adequate notice of sexual harassment was reasonable and not against the weight of the evidence.

(Footnote omitted).

Respondent has not filed a cross-petition seeking review of this aspect of the Sixth Circuit's decision.

In the alternative, respondent suggests that if certiorari is granted it will argue that an employer in a co-worker harassment case can invoke the affirmative defense recognized for supervisor-harassment cases by *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The Sixth Circuit rejected this argument (App. 3a n.1); respondent has failed to file a cross-petition on this issue.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgement and opinion of the Sixth Circuit.

Respectfully submitted,

LES JONES
DAVID E. GOODMAN, JR.
BURCH, PORTER AND JOHNSON
130 North Court Avenue
Memphis, TN 38103
(901) 524-5000

ERIC SCHNAPPER*
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*